STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and K. F. Kelly and Beckering, JJ.

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

_____/

Supreme Court No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

MICHIGAN DEPARTMENT OF TRANSPORTATION'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

On January 17, 2013, the Court of Appeals issued a published opinion in Docket No. 307616. (App 76a.) On February 28, 2013, Defendant-Appellant Michigan Department of Transportation (MDOT) timely filed an Application for Leave to Appeal with this Court. (App 13a.) Plaintiff-Appellee Heather Hannay filed a Brief in Opposition to MDOT's Application on April 5, 2013. (App 13a.) On September 27, 2013, this Court granted MDOT's Application. (App 83a.)

STATEMENT OF QUESTIONS PRESENTED

In the order granting MDOT's Application, the Court limited the issues to:

I. Whether economic loss in the form of wage loss may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008)).

MDOT's answer: No.

Hannay's answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

II. Whether the evidence in this case establishes that the plaintiff incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity.

MDOT's answer: No.

Hannay's answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

STATUTORY PROVISIONS INVOLVED

Section 7(1) of the Governmental Tort Liability Act, MCL 691.1401, *et seq.* (GTLA):

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [MCL 691.1407(1).]

Section 5 of the GTLA:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948. [MCL 691.1405.]

Section 3135 of the No-Fault Act, MCL 500.3101, *et seq.*:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> * * *
>
> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
>
> (a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

(d) Damages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under section 3163(4). Damages under this subdivision are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

(e) Damages up to $1,000.00 to a motor vehicle, to the extent that the damages are not covered by insurance. An action for damages under this subdivision shall be conducted as provided in subsection (4).

* * *

[MCL 500.3135.]

Section 3107 of the No-Fault Act:

(1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include either of the following:

(i) Charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care.

(ii) Funeral and burial expenses in excess of the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income

are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. For the period beginning October 1, 2012 through September 30, 2013, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $5,189.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 2013, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

(c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

* * *

[MCL 500.3107(1).]

INTRODUCTION

The Governmental Tort Liability Act, or GTLA, is an express but narrow waiver of the State's broad immunity from suit. If a plaintiff's claim does not fit within the GTLA and is not otherwise expressly authorized by statute, courts must assume that the State is immune from suit.

The GTLA provision at issue here is the motor-vehicle exception, which allows a claimant against the State to recover for "bodily injury" and property damage—and no other kind or category of damage. Notwithstanding that bright line for permissible recovery, Hannay asks this Court for economic damages.

Plaintiff's theory is that the No-Fault Act *impliedly* abrogated the GTLA by generically allowing certain economic damages, such as excess work loss. But there is nothing in the No-Fault Act that expressly abrogates state sovereign immunity. Indeed, the No-Fault provision on which Hannay relies was supposed to *diminish* defendant liability, not create a new exception to state immunity.

In the alternative, the economic damages that the trial court awarded in this case were not "work loss" benefits authorized by the No-Fault Act. Rather, they represented what Hannay *might* have earned had she (1) been accepted into a dental hygienist program, (2) completed the program, and (3) found employment as a dental hygienist. In other words, the damage award was a reflection of Hannay's loss of earning capacity, not her loss of income. If sustained, the trial court's approach would allow any plaintiff, no matter his level of education, to simply assert, "I would have been a doctor," or "a CEO," or "the Governor," and lost income would have to be calculated based on that fictional career. That is not the law.

STATEMENT OF FACTS

Hannay was injured on February 13, 2007, when an MDOT salt truck slid through an icy intersection and struck her vehicle. Although Hannay did not appear to be injured at the time, she has had several shoulder surgeries since the accident. In October 2009, she sued MDOT under § 5 of the GTLA. She also sued the salt truck driver for gross negligence. The claim against the driver was later dismissed.

PROCEEDINGS BELOW

The Court of Claims trial

A bench trial was heard before the Honorable Rosemarie E. Aquilina from October 10, 2011 to October 14, 2011. MDOT essentially conceded liability. (App 51a.) And except for arguing that Hannay had not sustained a serious impairment of bodily function, MDOT did not contest that Hannay was entitled to noneconomic damages. (App 58a.)

The parties presented much evidence regarding Hannay's economic damages, namely, whether she would have been employed as a dental hygienist. Hannay is a 2003 high school graduate. (App 31a and 46a.) She enrolled at Lansing Community College (LCC) in the fall of 2003. (App 31a, 45a, and 46a.) She took classes at LCC from 2003 to 2007. (App 39a.) Before the February 2007 accident, she obtained an associate's degree. (App 31a)

Following the accident, Hannay attended one semester of classes to try to achieve better grades for classes she had already taken. (App 39a.) In the summer of 2008, she looked into taking classes to become a nurse's assistant. (App 39a.)

Hannay took some classes, but withdrew from the program in the fall of 2008 due to the physical requirements. (App 27a and 40a.)

Before the accident, Hannay held two part-time jobs. (App 27a, 41a, and 42a.) She worked up to 25 hours per week as a sales clerk at a dime store. (App 42a.) She also worked as a dental assistant 25 hours per week for Mark Johnston, DDS. (App 42a.) Hannay made $10 per hour at each of these jobs. (App 26a and 17a.)

Hannay testified that she *desired* to become a dental hygienist. Enrollment in the dental hygienist program at LCC is open once per year. (App 19a.) The program accepts 20 students for each class. (App 19a.) There are three to four applicants for every person accepted into the program. (App 19a.) There is generally one year of classes, including anatomy, biology, and physiology, which must be taken as a pre-requisite to enrollment in the dental hygienist program. (App 18a.) Points are awarded for the applicant's grades and work experience. (App 16a.) Applicants with the highest number of points are selected for the 20 open positions. (App 47a and 48a.)

Hannay testified that she applied twice to the LCC dental hygienist program. (App 28a and 43a.) Her first application, submitted before the accident, was misplaced. (App 28a and 43a.) She submitted her second application after the accident. (App 28a and 43a.) Hannay was not one of the 20 applicants selected following her second application. (App 18a.) Thus, she was never accepted into the program.

Dental hygienists working in the State of Michigan must obtain an occupational license. (App 22a.) Hannay did not have such a license. (App 23a.) But she testified that Dr. Johnston would have hired her as a dental hygienist and paid her $28 per hour with benefits. (App 30a and 44a.)

Whether Hannay would have been employed full time as a hygienist was also an issue at trial. Dr. Johnston testified that he employs five to six dental hygienists in his office. (App 20a.) None work 40 hours per week. (App 20a.) Each hygienist works between 8 and 22 hours per week in his office. (App 20a.) They also work part time in other dental offices. (App 21a.) Dr. Johnston testified that 30% to 40% of the hygienists who start work leave the occupation or reduce their hours to less than 40 hours per week. (App 22a)

Hannay asked the trial court to award her noneconomic damages of $1,775,000. She also asked for economic damages for excess work loss as a dental hygienist of $1,109,628, reduced to present value. (App 31a and 57a.) Alternatively, Hannay asked the court to award economic damages for excess work loss as a dental assistant of $578,040, reduced to present value. (App 31a and 57a.) Hannay also asked for economic damages for loss of services of either $153,872 (40% loss of capacity) or $76,936 (20% loss of capacity). (App 35a.)

MDOT argued that Hannay's claims for excess work loss and excess loss of services did not constitute "bodily injury" or "property damage" per GTLA § 5. (App 28a, 29a, 52a, and 53a.) MDOT also argued that the excess work loss claimed by Hannay for earnings as a dental hygienist was in reality a claim for loss of earning

capacity and not compensable under § 3135(3)(c) of the No-Fault Act. (App 28a, 54a, 55a, and 56a.) The trial court held that Hannay had proven liability as well as serious impairment of body function. (App 62a, 66a, and 67a.) It assigned no comparative fault to Hannay.

The court awarded Hannay noneconomic damages of $474,904. (App 68a.) It also awarded her economic damages of $767,076 for excess work loss benefits as a dental hygienist (employed part-time, or 60% earning capacity) and $153,872 for excess loss of services. (App 72a and 73a.)

On December 14, 2011, the trial court entered a judgment. It added Hannay's taxable costs of $18,575.30 and pre-judgment interest of $97,662.29 onto the entire verdict of $1,395,852. The total judgment, as of December 14, 2011, was $1,512,089.59.

MDOT timely appealed to the Court of Appeals. Hannay filed a claim of cross appeal. She argued that the trial court's award of excess wage loss of $767,076 was insufficient because the court should have ruled that Hannay had sustained a 100% loss of earning capacity as a dental hygienist.

On April 17, 2012, MDOT paid Hannay $531,635, which consisted of the noneconomic damages, interest, and taxable costs. (App 75a.)

The Court of Appeals' decision

The Court of Appeals affirmed the trial court's decision awarding Hannay excess work loss damages of $767,076 for projected part-time work. (App 82a.) The Court of Appeals also affirmed the award of loss-of-services damages of $153,872.

On Hannay's cross appeal, the Court of Appeals declined to increase the excess work loss damages to a full-time amount.

STANDARD OF REVIEW

This Court has held in decisions interpreting both the GTLA and the No-Fault Act that issues of statutory interpretation are reviewed de novo. *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 202; 731 NW2d 41 (2007); *Johnson v Recca,* 492 Mich 169, 173; 821 NW2d 520 (2012).

ARGUMENT

I. Economic loss in the form of excess wage loss is not "bodily injury."

A. Subject to specific exceptions, GTLA § 7(1) abolishes all governmental tort liability if the government is engaged in a governmental function.

From the time of its creation, Michigan has enjoyed sovereign immunity because the State, as creator of the courts, was not subject to them or their jurisdiction. *Ross v Consumers Power Co,* 420 Mich 567, 598; 363 NW2d 641 (1984). The history of this State's common-law sovereign immunity before the enactment of the GTLA in 1964, and the GTLA itself, are extensively examined in this Court's seminal opinion in *Ross v Consumers Power Co.* There, this Court noted:

> The heart of the act is § 7, which provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.] [*Id.* at 595.]

Stated differently, the Legislature has declared that the State's inherent immunity from tort liability bars suits when the State is engaged in the exercise or

discharge of a governmental function. But the Legislature also created six specific and narrowly construed exceptions to this general tort immunity. *See In Re Bradley Estate,* 494 Mich 367, 378 n 21; 835 NW2d 545 (2013). These exceptions provide the sole means by which tort liability and damages can be imposed upon the State.

1. The GTLA is the exclusive statutory mechanism by which the State's complete immunity from tort liability can be waived.

Section 7(1) of the GTLA sets forth the State's broad immunity:

> *Except as otherwise provided in this act,* a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1) (emphasis added).]

The "[e]xcept as otherwise provided in this act" language, at the beginning of § 7, makes clear that the Legislature, as recently as 1999,[1] did not want the State's sovereign immunity from tort liability to be waived by any other statute. And "tort liability," as used in § 7, was defined recently by this Court to mean "all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate,* 494 Mich at 371.

Consequently, the only way to escape the State's sovereign immunity to all tort liability is through the exceptions in the GTLA. And such exceptions are narrowly construed. *McNeil v Charlevoix Co,* 484 Mich 69, 84; 772 NW2d 18 (2009), (citing *Mack v Detroit,* 467 Mich 186, 196 n 10; 649 NW2d 47 (2002)). Thus, tort

[1] Section 7(1) was most recently amended in Public Act 241 of 1999.

liability for the operation of a government-owned motor vehicle, and the resultant damages, can only be allowed through an exception to governmental immunity. Section 5 of the GTLA, MCL 691.1405, is that exception.

2. Section 5 of the GTLA creates a narrow waiver of the complete immunity conferred in § 7(1).

a. Section 5 limits the State's liability to bodily injury or property damages.

Section 5 of the GTLA, the motor-vehicle exception, provides:

> Governmental agencies shall be liable for *bodily injury* and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . . [MCL 691.1405 (emphasis added).]

This language limits the damages recoverable under the waiver of tort immunity. As this Court stated in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008), § 5 imposes liability for "bodily injury" and "property damage" resulting from a governmental employee's negligent operation of a government-owned motor vehicle. So the waiver of immunity is limited to two categories of damage: bodily injury and property damage. *Id.*

b. "Bodily injury" does not include economic loss.

In *Wesche*, this Court analyzed whether the motor-vehicle exception authorizes a claim for loss of consortium against a governmental agency. This Court concluded that a loss of consortium is not "bodily injury," and the Court's analysis of what "bodily injury" means is helpful to the instant case. It began by

noting that although the GTLA does not define bodily injury, that term is not difficult to understand:

> The word 'bodily' means 'of or pertaining to the body' or 'corporeal or material, as contrasted with spiritual or mental.' *Random House Webster's College Dictionary* (2000). The word 'injury' refers to 'harm or damage done or sustained, [especially] bodily harm.' *Id.* Thus, 'bodily injury' simply means *a physical or corporeal injury to the body.* [*Wesche,* 480 Mich at 84-85 (emphasis added).]

Here, Hannay's claim of economic loss, specifically, her wage loss, is not *a physical or corporeal injury to the body.* In fact, the noneconomic damages that MDOT has already paid to Hannay reflect the physical or corporeal injury to her body. Had the Legislature intended for economic damages to be compensable in motor-vehicle accidents involving the State, the Legislature would have included economic damages in § 5. It did not.

While one might argue that such economic loss *results* from a physical or corporeal injury to the body, the Legislature did not provide for the recovery of such consequential losses when it wrote § 5. And whether and under what circumstances governmental-vehicle tort claims should include such economic loss as damages is a matter to be addressed by the Legislature.

The Court of Appeals panel below refused to follow *Wesche.* It opined that the question is whether wage loss is a type of bodily injury and said that in *Wesche* the issue was whether GTLA § 5 authorizes a claim for loss of consortium. It concluded that MDOT's reliance on *Wesche* was misplaced. It went on to hold that damages for work loss are "merely types or items of damages that may be recovered *because of* the bodily injury plaintiff sustained." *Hannay,* 299 Mich App at 269.

But no such safe harbor appears in the text of GTLA § 5, and none was created by this Court in *Wesche*. GTLA § 5 allows a claimant to recover for physical or corporeal injury to the body, not for damages that result *because of* the bodily injury.

3. The No-Fault Act does not conflict with the GTLA.

The No-Fault Act, enacted in 1972, was a legislative response to problems in the tort (or fault) liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. *Shavers v Attorney Gen*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Per the Act, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort. *Id.* at 579. The Act was intended to provide certainty of compensation for some (but not all) of the economic damages that an injured person sustained in an accident with a nongovernmental tortfeasor. *See* MCL 500.3107(1)(b).

Because benefits would now be provided by first party providers, the Act abolished tort liability, subject to certain exceptions, for harm caused while owning, maintaining, or using a motor vehicle in Michigan. *See American Alternative Ins Co, Inc v Farmers Ins Exch*, 470 Mich 28, 30; 679 NW2d 306 (2004). The primary exception to this broad abolition allows a suit to be maintained when there is death, serious impairment of body function, or permanent serious disfigurement. *Id.* at 30-31. Another exception, which is relevant here, allows excess economic damages:

> (3) *Notwithstanding any other provision of law, tort liability* arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect *is abolished except as to*:
>
> * * *
>
> (c) *Damages for allowable* expenses, *work loss*, and survivor's loss *as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections*. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured. [MCL 500.3135(3) (emphasis added).]

On its face, subsection 3 nullifies all other laws that allow persons injured by motor vehicles to sue in tort. It is a diminution of liability. But the question in this case is whether the few exceptions that remain for tort liability under the No-Fault Act, specifically, the excess work loss, trump sovereign immunity and the GTLA. And because there is no language in the No-Fault Act expressly making the Act applicable to the State as a tortfeasor, immunity has not been abrogated. Moreover, because the No-Fault Act and the GTLA can be read harmoniously, with effect able to be given to each, they do not conflict.

B. Only the Legislature can waive tort immunity, and such waiver must be express.

Governmental immunity is an inherent characteristic of government. *Mack v Detroit,* 467 Mich at 190. Absent specific language doing so, this Court has repeatedly declined to find a waiver of governmental tort immunity in statutes other than the GTLA. See, e.g., *Mead v Pub Service Comm,* 303 Mich 168, 173; 5 NW2d 740 (1942); see also *Anzaldua v Band,* 457 Mich 530, 551; 578 NW2d 306

(1998); and *Ballard v Ypsilanti Twp*, 457 Mich 564, 574; 577 NW2d 890 (1998) (both citing *Mead*, 303 Mich 168). As this Court stated in *Mead*:

> Irrespective, however, of how impelling the argument may be that governmental agencies with large numbers of motor vehicles on the highway should not be absolved from liability to innocent victims of the carelessness of the drivers of such vehicles, *a change in the established law of immunity of such governmental agencies as owners of such vehicles, cannot be brought about by judicial fiat. It can only be done by the legislature.* [*Mead*, 303 Mich at 174 (emphasis added).]

1. No text in the No-Fault Act expressly waives the governmental immunity conferred by the GTLA.

Nothing in the text of the No-Fault Act can be read as an explicit waiver of the State's sovereign immunity. Nor does the Act expressly amend or alter the GTLA. The Legislature is presumed to have been aware of the existence of the GTLA when it enacted the No-Fault Act. *See Driver v Naini*, 490 Mich 239, 262 n 74; 802 NW2d 311 (2011). The Legislature knew that it could use the Insurance Code, and the particular sections dealing with the No-Fault Act, to expressly make governmental tortfeasors sued under § 5 of the GTLA liable for economic damages. But it chose not to do so. That omission shows that the Legislature did not intend to use the No-Fault Act as a vehicle to alter the governmental immunity conferred by the GTLA.

Here, the lower courts found the phrase "[n]otwithstanding any other provision of law" in No-Fault Act § 3135(3) to be the applicable legislative enactment. But as explained above, this phrase is a *diminution* of tort liability. It does not purport to *expand* the State's tort liability and falls far short of the express abrogation that sovereign immunity requires.

2. Nor has the State's immunity been waived by necessary inference.

In *Mead*, this Court suggested that the State's sovereign immunity could be waived by necessary inference as well as by express statutory enactment. But the Court was unwilling to find a waiver by either method. There, the Court was interpreting the language of the then-existing motor-vehicle-liability statute. The question was whether the broad wording of the act, which imposed tort liability on the owners of automobiles driven on state highways also applied to State-owned vehicles by necessary inference. This Court concluded that it did not:

> It is obvious that the State, either directly or through its agencies, may be and is the owner or motor vehicles. As to such ownership, there is nothing in the statute to the contrary. See 1 Comp.Laws 1929, § 4632, Stat.Ann. § 9.1561. Notwithstanding the statute, 1 Comp.Laws 1929, § 4648, Stat.Ann. § 9.1446, provides: "The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle * * *," it would be contrary to the great weight of the authority to hold that by enacting this provision of the statute the legislature intended to deprive the State of immunity from liability incident to the negligent use of its automobiles; and in that respect place the State on a par with private or corporate owners. The act is not couched in terms sufficiently clear and specific to make it applicable to State ownership of motor vehicles, and thereby indirectly deprive the State of immunity from liability incident to the negligent use of its motor vehicle. . . . To hold that the Michigan Motor Vehicle Law deprives the sovereign State of immunity in the respect noted would be to construe the act as including an important provision of which there is no hint in the title of the act. That would render the act in that particular unconstitutional. [*Mead*, 303 Mich at 171-172 (citations omitted).]

This Court's analysis in *Mead* applies equally here. The statute at issue in *Mead* contained no reference whatsoever to the State, much less a waiver of its sovereign immunity. The same is true here.

3. Express waivers of governmental immunity are contained in statutes creating tort-type causes of action.

The Legislature has expressly waived the State's governmental immunity for certain statutorily created causes of action. For example, the State is defined as an "employer" or "person" in the Whistleblowers Protection Act, MCL 15.361(a)(b)(d), MCL 15.362; the Persons with Disabilities Civil Rights Act, MCL 37.1103(g), MCL 37.1201(b), MCL 37.1202(1); and the Elliott-Larsen Civil Rights Act, MCL 37.2103(g); MCL 37.2201(a); MCL 37.2801(2)(3). It is also defined as an "employer" and subject to payment of wage and medical expenses due under the Workers Disability Compensation Act, MCL 418.151(a), MCL 418.161(1)(a). Under the Freedom of Information Act, MCL 15.232(d)(i), MCL 15.240(6)(7), the State may be liable for attorney's fees and compensatory or punitive damages. The State may also be liable for attorney's fees for non-compliance with the Open Meetings Act, MCL 15.262(a), MCL 15.271(4).

All of the preceding statutes have one thing in common. The State is included in the definitions of persons or entities subject to the acts. The No-Fault Act fails to do this. In fact, there is no language in the entire No-Fault Act that explicitly waives the governmental immunity in the GTLA. And § 3135(3) (and

§ 3107(1)) of the No-Fault Act contain no text making governmental tortfeasors responsible for excess wage loss.

This Court, in *Hardy v Oakland Co*, 461 Mich 561; 607 NW2d 718 (2000), harmoniously interpreted the two statutory sections at issue here, GTLA § 5 and No-Fault Act § 3135. The Court held that a tort claimant under GTLA § 5 had to meet the serious impairment threshold in No-Fault Act § 3135(1):

> We are called upon to apply statutory provisions that are arguably in conflict. . . .
>
> In the present case, subsection 3135(1) of the no-fault act provides that the plaintiff can maintain his action for noneconomic tort damages only on a showing that he 'has suffered death, serious impairment of body function, or permanent serious disfigurement.' Yet § 5 of the immunity statute says without qualification that a government agency such as the defendant county 'shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . .'
>
> The apparent conflict is readily resolved by resort to the plain language of these provisions. Subsection 3135(2) [now subsection 3135(3)] of the no-fault act, which contains the partial abolition of tort liability, opens with the introductory clause, 'Notwithstanding any other provision of law . . . .' On its face, therefore, this measure reflects *the Legislature's determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute.*
>
> For this reason, *the circuit court was correct when it ruled that the plaintiff was required to meet the no-fault thresholds in this instance in that he was required to show serious impairment of body function in order to prevail in his suit for noneconomic* damages caused by the deputy's negligence. This result accords with the intent of the Legislature as reflected in the plain language of the pertinent statutes. [*Hardy*, 461 Mich at 564-566 (emphasis added, footnotes omitted).]

In other words, a claimant seeking damages from the government must meet the requirements of *both* the GTLA and the No-Fault Act.

After *Hardy,* the Court of Appeals harmoniously construed the two sections at issue and ruled that a plaintiff is required to meet the requirements of both GTLA § 5 and No-Fault Act § 3135:

> The issue in *Hardy* was not whether the plaintiff had to show 'bodily injury' to invoke the motor vehicle exception to governmental immunity stated in MCL 691.1405, but whether he *also* had to satisfy the serious impairment of body function threshold for tort liability under the no-fault act, MCL 500.3135. In holding that the plaintiff did, our Supreme Court did not determine that a plaintiff pursuing a tort remedy for noneconomic damages under the no-fault act need not meet the requirements of MCL 691.1405. Indeed, *such a holding would have been tantamount to stating that the Legislature impliedly repealed MCL 691.1405 to the extent that it pertained to such cases. But a repeal by implication may be found only when there exists a clear conflict between two statutes that precludes their harmonious application. The plain language of MCL 691.1405 and MCL 500.3135 may be read harmoniously to provide that a plaintiff may avoid governmental immunity if he suffers 'bodily injury' under the motor vehicle exception of MCL 691.1405, but he must also satisfy the no-fault act threshold for bringing a third-party tort claim, i.e., a plaintiff must establish a serious impairment of a body function as stated in MCL 500.3135.* Thus, we must reject plaintiffs' argument that Allen was not required to show a "bodily injury" within the meaning of MCL 691.1405 for the motor vehicle exception to governmental immunity to apply to his tort claim against the district. [*Allen v Bloomfield Hills School Dist,* 281 Mich App 49, 55-56; 760 NW2d 811 (2008) (emphasis added, citations omitted).]

In sum, there is no text in the No-Fault Act that abrogates sovereign immunity or modifies the GTLA. This Court should direct that judgment be entered in favor of the State on Hannay's claims for economic damages.

II. The evidence in this case establishes that Hannay incurred a loss of income of $10 per hour from work as a dental assistant, not a loss of income of $28 per hour as a dental hygienist, a job she never held.

Before Hannay was injured in the motor-vehicle accident, she worked as a dental assistant and as a sales clerk. She earned $10 per hour at each job. She

never worked as a dental hygienist, either before or after the accident. She never earned $28 per hour.

If this Court holds that Hannay's economic damages constitute a bodily injury under GTLA § 5, the question will then become whether she was entitled to excess wage loss under No-Fault Act § 3135(3)(c) based on her desired work as a dental hygienist at $28 per hour. The answer is "no."

A. Section 3107(1)(b) of the No-Fault Act limits economic damages in the form of work loss benefits to loss of income from work an injured person *would have* performed.

The No-Fault Act's award of excess work loss in § 3135 refers back to § 3107(1) of the Act for the definition of work loss. That section limits Hannay's recovery of lost income to income from work that she would have performed after her accident if she had not been injured:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> * * *
>
> (b) Work loss consisting of loss of income from work an injured person *would have* performed during the first 3 years after the date of the accident if he or she had not been injured. . . . [MCL 500.3107(1) (emphasis added).]

The text does not contemplate recovery for work that Hannay *could* have performed after the accident if she had appropriate training and was able to obtain a different job. Such a test would allow a plaintiff to allege an intent to be trained for and

acquire nearly any job (stock broker, lawyer, brain surgeon). That is not how MCL 500.3107(1) is supposed to operate.

B. Case law supports the plain meaning of the text.

In *Ouellette v Kenealy*, 424 Mich 83, 84; 378 NW2d 470 (1985), this Court held that damages for loss of earning *capacity* are not recoverable under the No-Fault Act. It explained that Michigan's No-Fault Act was patterned after a model act. Because it said that the Michigan Legislature would have been aware of the policies underlying the model act, the Court quoted some of the comments from the drafters of the model act. *Id.* at 86. Importantly, the comments distinguished work loss from loss of earning capacity: "'Work loss,' as are the other components of loss, is restricted to accrued loss, *and thus covers only actual loss of earnings as contrasted to loss of earning capacity.*" *Id.* at 86-87. It held that damages are not recoverable for loss of earning capacity. *Id.* at 88.

Two years after *Ouellette*, the Court of Appeals decided *Swartout v State Farm Mut Automobile Ins Co*, 156 Mich App 350; 401 NW2d 364 (1987). *Swartout* demonstrates how a plaintiff can show that alleged future earnings constitute wage loss under the No-Fault Act rather than loss of earning capacity. In *Swartout*, a nursing student was injured in an automobile accident two months before she would have graduated with a degree qualifying her as a licensed practical nurse. *Id.* at 352. She submitted an affidavit to the trial court from her college stating that but for the accident, she would have graduated. She also submitted an affidavit from her employer hospital stating that had she graduated on time, it would have hired

her within two months of her graduation. In the affidavit, the hospital identified the wage that it would have paid her. *Id.* The Court of Appeals ruled that because of the definitive nature of her pleaded facts, the plaintiff had stated a claim for wages that she would have earned, rather than could have earned, but for her injuries.

In stark contrast here, Hannay was not even accepted into any dental hygienist program, much less obtained enough credits to near graduation. And the statement by Hannay that Dr. Johnson would have employed her as a dental hygienist at $28 per hour was obviously conditioned on her becoming a dental hygienist, something she was not on track to accomplish. It was nothing more than wishful thinking.

Hannay's situation is more akin to that of a student in *Gerardi v Buckeye Union Ins Co,* 89 Mich App 90, 94; 279 NW2d 588 (1979). There, a nursing student sustained personal injuries while operating a motor vehicle. As the result of her injuries, the student claimed she had to delay her studies one year and lost income and fringe benefits that she would have earned as a registered nurse.

The Court of Appeals analyzed the history of the No-Fault Act and stated that the Legislature intended to provide work loss benefits for actual loss, not for loss of earning capacity. *Id.* at 93. The Court then applied the law to the student's facts and dismissed her case:

> Therefore, under either analysis [about whether an amendment to the No-Fault Act was retroactive], plaintiff must allege an actual loss of income that she would have earned but for the accident. At the time of her injury the plaintiff still had one year remaining before completion

> of her nursing studies. Obviously, plaintiff would not have been able to work as a registered nurse prior to her accident; she thus had no previous earnings as a nurse upon which work loss may be calculated. Neither can plaintiff demonstrate that during the year lost as a result of the accident, she would have received income working as a registered nurse. [*Id.* at 94-95.]

Hannay's likelihood of earning wages as a dental hygienist was even more remote than the student in *Gerardi*. She is not entitled to wage loss damages of $28 per hour.

C. The lowers courts improperly speculated that but for the accident, Hannay would have been employed in an occupation that she never performed or qualified for before the accident.

Hannay had not been accepted in the LCC dental hygienist program before the accident. And she had no guarantee of acceptance into the program, of graduation from the program, or of future employment as a dental hygienist. But she did have pre-accident earnings as a sales clerk and as a dental assistant at Dr. Johnston's office. Thus, the Court of Claims erred when it speculated that:

- Hannay would have been accepted for enrollment in the dental hygienist program at LCC;
- She would have completed the two-year clinical course;
- She would have received her occupational license; and
- At the end of that uncertain and long process, she would have had a $28 per hour job waiting for her at Dr. Johnston's dental practice.

And the Court of Appeals erred when it affirmed the Court of Claims' speculations.

Hannay was employed before the accident. She earned $10 per hour. Because she was employed, Hannay had an established pattern of earnings that the trial court should have used as a proper template in calculating wages that she

would have earned. Accordingly, if the Court holds that MDOT is liable for economic damages notwithstanding sovereign immunity, MDOT asks that the Court award wages based on Hannay's *actual* earnings of $10 per hour.

CONCLUSION AND RELIEF REQUESTED

The lower-court rulings in this case abrogate MDOT's sovereign immunity with no basis in the statutory text. Such a significant change in the State's immunity from tort liability must be clearly expressed, and the only branch of government equipped to make that expression is the Legislature. Until the Legislature changes the GTLA, GTLA §§ 7(1) and 5 and No-Fault Act § 3135(3) must be read together and given full effect. Because the GTLA only allows damages for Hannay's bodily injury (the physical or corporeal injury to her body), she is prohibited from pursuing economic damages against the State.

Alternatively, Hannay was never certified and never worked as a dental hygienist before the accident. Accordingly, the lower courts also erred by awarding economic damages in the form of excess wage loss on her *desired* earnings of $28 per hour as a dental hygienist, instead of work that she *actually* performed at $10 per hour.

MDOT respectfully requests that the Court reverse the Court of Appeals and enter judgment in MDOT's favor on Hannay's claim for economic damages. Alternatively, MDOT asks that such economic damages be re-calculated at $10 per hour.

Respectfully submitted,

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